

DISCUSSION RESPONSE

## Victor's Justice, Contested

A Response to Gabriel Lentner

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In his post, Gabriel Lentner argues that the ICC legitimizes and reproduces “victor’s justice” through its acceptance of Article 13(b) referrals from the Security Council. He takes issue with the legal nature of the referrals, in which he finds the legitimization of a double standard of international justice in the Rome Statute. He also sees a double standard in the referrals themselves. That is, the referrals under Article 13(b) are tailored to support, or at least conform to, the interests of Security Council members.

For Lentner, this is problematic because the Rome Statute thereby institutionalizes the very injustice that the ICC should ideally combat. Though the ICC’s goal is to bring equal criminal justice to the “international community,” the Rome

Statute gives favored status to the P5 while they refuse to submit themselves to the Court's scrutiny. What makes the arrangement unique is that the P5 need not win a war to create result-oriented, one-sided criminal justice, centered on actors in weak states—victor's justice.

While Lentner focuses on a solution from an academic point of view, this response will focus on the institutions themselves – the Security Council, states, and the ICC – to show where struggles against the idea of victor's justice have happened and where they are going.

## Debates over UNSC Influence in the Rome Statute

The inclusion of the Security Council referral in Article 13(b) does institutionalize victor's justice through Security Council referrals, but in a managed form. The rest of Article 13 provides ways for the ICC to assert jurisdiction without the Council's consent. The Security Council can also defer investigations or prosecutions per Article 16, but each P5 state is able to veto a possible deferral. And according to the preamble to the Rome Statute, the ICC should “contribute to the prevention of” “grave crimes [that] threaten the peace, security and well-being of the world.” The mandate of the Court complements and challenges that of the Security Council, and the provisions of the Statute allow the ICC some, at least *de jure*, independent space in which to work.

The Statute could have more fully subjected the Court to the Council. Recall that the debates regarding the Rome Statute took place within the United Nations, where the supremacy of the P5 in the Security Council is institutionally entrenched. In addition, the International Law Commission supported the

creation of a permanent court that would lack jurisdiction over any matter “being dealt with” by the Security Council. Likewise, the United States hoped for a much stronger form of victor’s justice in which Americans would be triable only by U.S. consent.

Through the efforts of the Like-Minded Group of States and NGOs, a compromise was reached that allowed the Security Council to expand the jurisdiction of the Court beyond the nationals and territory of consenting states, but while generally preserving the legal independence of the Court. As Benedetti et al. note, the familiarity and limited purpose of the idea of a criminal court and the experiences of the ad hoc tribunals made a unified opposition to the American position effective.

Still, the desire for universality and enforceability gave the Americans and other P5 states room to negotiate important issues of jurisdiction. The compromise between the Court’s supporters and the Americans, Chinese, and Russians is reflected in Articles 12 and 13 of the Rome Statute. Though the Court may act without the express approval of the Security Council, jurisdiction is based on consent (through ratification or, as in Ukraine, with regard to a situation) or Security Council referral. This arrangement largely shields the P5 from the jurisdiction of the ICC; however, the conferral of jurisdiction based on the consent of the state where the alleged crime occurred at least introduces the legal possibility for the Court to investigate and perhaps indict even nationals of non-consenting P5 members, as the case of Ukraine demonstrates.

## Victor's Justice in the Referrals

The two Security Council referrals to reach the ICC thus far (UNSC Resolution 1593 (2005) and UNSC Resolution 1970 (2011)) do reflect and promote victor's justice, but they also show the conflicted stance of the P5 toward the Court. They show how the P5 see the Court as a useful tool, but only if they can control it. The referrals allow the Security Council to target specific states, and even specific groups, while granting exclusive jurisdiction over the nationals of intervening states not party to the Rome Statute only to those intervening states. In other words, they prevent the Court from finding that any of their nationals might have committed crimes. They consume many of the Court's limited resources without allowing the UN to supplement the Court financially, and they require no contribution to the success of the Court's efforts in either situation. In the Darfur referral, for example, the US negotiated the "no UN funding" clause, recognition of "Article 98 agreements" (bilateral agreements in which states agreed not to surrender Americans to the Court), and a paragraph attempting to limit not only the ICC's jurisdiction over non-nationals, but universal jurisdiction as well.

The referrals also reflect and reinforce geopolitical interests of the major powers. The referral of the Darfur situation, for example, shows that the Security Council members are willing to use the Court when convenient to ignore the possibility of using stronger measures, such as military force, to handle a situation. On the other hand, as Makau Mutua writes, Resolution 1970 has been condemned as an attempt to legitimize the forceful ouster of Muammar Gaddafi in Libya.

Of course, the Court could do more to challenge the victor's justice promoted by the referrals. Article 13(b) of the Rome Statute is permissive, rather than mandatory, and the Court could better set the conditions under which it will accept Security Council referrals. (See Dapo Akande's comments on David Kaye's proposals [here](#).) In particular, the Court should refuse to act where the Security Council has referred only a set of actors, rather than a situation delimited only by time and space.

## Challenging Victor's Justice

In recent years, the Office of the Prosecutor (OTP) has been somewhat more willing to challenge the P5, despite their influence over the Court. The OTP's strategy of seemingly ignoring the one-sided jurisdictional limits in the Libya referral is a legally questionable, but politically savvy way to affirm the Court's mandate while asserting its commitment to equal justice within the Libyan situation. Its investigations into Afghanistan and Georgia challenge the UK, the US, and Russia in ways that will at least call attention to their determination that the Court should not function to prosecute their nationals. In addition, the Court's acceptance of Palestinian membership and the situation there challenges the United States' close ally, Israel. (See David Bosco's comments [here](#).)

These examinations and investigations show that the ICC is at least willing to use its moral authority to challenge the idea that nationals of powerful states should be immune from its scrutiny. Rather than accommodating the P5 in the hope of garnering universal support, the ICC is now challenging the P5 in the hope of normalizing the actions of the ICC in post-conflict situations wherever it may legally act. Even if no

trials result, and therefore a longer list of not practically triable indictees, the visible, good-faith effort by the Court to investigate, report, and indict will help it to challenge the notion that it is responsible for the victor's justice of the P5.

While challenging the P5 can help to counter accusations from less powerful states that the ICC is characterized by victor's justice, the ICC's strategy has resulted in new accusations of bias. Russia, in particular, has argued that the investigation in Georgia still represents victor's justice of a sort, even as it had supported the examination into the 2008 war in South Ossetia. As Mark Karsten points out, the Court's decision to investigate is intertwined with the Western narrative that Russia is an "aggressive" state. The Court, he argues, chose to make Russia the first P5 member subject to a full investigation based on Russian political isolation as much as on the realities of the South Ossetian War. For its part, Russia denies having been aggressive in Georgia and argues that the Court has "taken the aggressor's side," that of US-backed Mikheil Saakashvili.

But victor's justice still may lead to justice. From the victor's justice of Nuremberg came the vocabulary to challenge the actions of even powerful warring states, as David Forsythe points out. More recently, as David Bosco outlines, in the early years of the ICC, the United States had difficulty challenging the narrative of accountability offered by the Court's supporters at least in part because of the hypocrisy of its own defense of sovereignty. The UK and France, themselves enmeshed in European Union politics, actually deflected US pressure from smaller European states, and promoted an accountability narrative that saw the US eventually lend tacit support to the Court with regard to Sudan and Libya.

## Conclusion

Of course the insertion of the Security Council referral into the Rome Statute was victor's justice, and of course the P5 use that power in self-serving ways. However, the relationship between the Security Council and the ICC is not altogether determined by victor's justice. The Security Council's power to defer could be a powerful check on not just a rogue prosecutor, but on a Court focused so strongly on prosecuting criminals that it loses sight of the political costs. And the ICC—by promoting norms of accountability and equal justice, whether through its own agency or in concert with small and medium states—can provide an important foil to the politics of the Security Council.

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